



CHARLES S. BRACK
COUNTY ATTORNEY
CHAMBERS COUNTY

FILE #

I.D.#

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Opinion Committee

POST OFFICE BOX 1200
ANAHUAC, TEXAS 77514

February 10, 1993

Honorable Dan Morales
Attorney General, State of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RQ-505

RE: Request for opinion:
Whether the Chambers County Commissioners Court has the authority to create
a Civil Process Department, separate and apart from the control of the sheriff.

Dear Mr. Morales:

Your advise and opinion is respectfully requested concerning the above mentioned issue
and in connection therewith, I would show the following facts:

FACTUAL BACKGROUND

In July, 1992, the Chambers County Commissioners Court created a "Civil Process Office". It is reported that this office performs all of the duties that the sheriff's office performed regarding civil process before the office was created, except the actual service of the process, which is performed by the sheriff, his deputies, various constables and their deputies. The office picks up citations, writs, subpoenas, etc., from the clerks of the county's various courts; logs the documents into computers and other records; receives and deposits service fees; prepares and publishes required public notices and forwards the process to the county's various constables for service. The employee who occupies the office of civil process is also a deputy constable, who sometimes serves the papers she processes.

ANALYSIS

There are no constitutional provisions that link commissioners court to civil process, however, there are at least two statutes which mention the court and civil process, Section 81.022 and Section 118.131 of the Texas Local Government Code. Section 81.022 authorizes

commissioners court to issue civil process to execute its powers and duties and enforce jurisdiction, however, such process must be directed to the sheriff or constable. Section 118.131 permits the commissioners court to set fees to be charged for the service of process by sheriffs or constables.

Neither of the above mentioned statutes impose any duty, express or implied, on commissioners court involving the handling and service of process. On the contrary, both statutes clearly indicate that that function is reserved to sheriffs and constables.

There are no constitutional civil process duties placed on sheriffs or constables, however, the legislature, acting pursuant to Article V, Section 23 of the Texas Constitution, has imposed many duties on sheriffs with regard to the service of process. For instance, Section 85.021, Texas Local Government Code states:

"(a) the sheriff shall execute all process and precepts directed to the sheriff by legal authority and shall return the process or precept to the proper court on or before the date the process or precept is returnable."

Similar duties, as mentioned above, have been placed on constables pursuant to Article V, Section 18 of the Texas Constitution.

Various statutes authorize public bodies and agencies to have their processes, notices, subpoenas, etc., served by sheriffs and constables. For example, Section 432.188-189, Texas Government Code, provides that process issued by a court-martial under the Texas Code of Military Justice shall be served by sheriffs and constables. Likewise, service of Railroad Commission processes are provided for by Article 911(a), Section 13, V.A.T.S., and service of the Department of Agriculture processes are governed by Section 71.049, Agricultural Code. Additionally, the Texas Rules of Civil Procedure have many rules pertaining to the service of process by sheriffs and constables. For example, Rule 15, Texas Rules of Civil Procedure, provides that all process "shall be directed to any sheriff or any constable within the State of Texas."; and Rule 103, Texas Rules of Civil Procedure, states that process ". . . may be served anywhere by (1) any sheriff or constable."

The Legislature has imposed numerous criminal and civil penalties on sheriffs and constables for improper execution of process. For example, Section 34.066, Texas Civil Practice and Remedies Code, allows for damages to be awarded to an injured party for an improper execution sale; Section 7.001, Texas Civil Practice and Remedies Code, authorizes court sanctions through its contempt powers; Section 26.048, Texas Government Code, governs motions against a sheriff or another officer for defalcation of duty in connection with civil process; Section 85.021 and 86.024, Texas Local Government Code, provides for court sanctions through its contempt powers for false returns or failure to return a process; and, Article 6252-2, V.A.T.S., provides that county officers are subject to forfeiture of one month's wages or removal from office for failure to publish required newspaper notices.

Commissioners court may exercise only such powers as the Texas Constitution and statutes expressly grant, together with such other implied powers that are reasonably necessary to carry out its express duties. Schope vs. State, 647 S.W. 2d 675 (Tx. App. - Houston, 1982). A commissioners court may not interfere with or usurp the duties and performance of independent county officials. Pritchard and Abbott vs. McKenna, 350 S.W. 2d 333 (Texas 1961). White vs. Pickett, 355 S.W. 2d 848 (Tex. Civ. App. - San Antonio, 1962). The above mentioned statutes and rules reveal clear legislative intent to place the duty of executing process of courts and other governmental agencies upon sheriffs and constables.

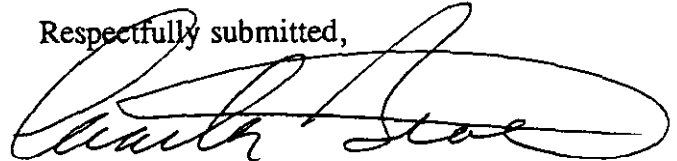
The commissioners court has exceeded its authority in creating and expending money on the office of "Civil Process" in that there is no constitutional or statutory provision which even by implication would authorize its creation or maintenance. Moreover, they have assumed control over a function of the sheriff's department that the legislature has delegated solely to the sheriff's department and other constables of the county, thus violating the separation of duties doctrine. Pritchard and Abbott vs. McKenna, supra.

Another issue arises from the fact that the employee who occupies the office of civil process, is also a deputy constable. When two offices or positions demand dual allegiance to potentially conflicting authority, the common law doctrine of incompatibility applies. Texas Attorney General Opinion No. H-727 (1982) held that a deputy sheriff under the supervision of the sheriff could not also be a town marshal accountable to the city council. Even if the office of civil process was validly created by commissioners court, the official of that office cannot also serve as a deputy constable or sheriff.

Because the Civil Process office is staffed and functioning with an annual budget of over \$25,000 the issues presented are of great importance to the county and to the taxpayers of the county. If at all possible, please expedite the rendering of your opinion.

I thank you in advance for your time and consideration concerning this request.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles S. Brack", written over a horizontal line.

Charles S. Brack
County Attorney
Chambers County

CSB/pw

cc: Honorable Oscar Nelson, County Judge
Honorable Phillip Burkhalter, Sheriff
Jimmie Moorhead, County Auditor
Commissioner Mark Huddleston, Pct. 1
Commissioner Sid Desormeaux, Pct. 2
Commissioner Jimmy Sylvia, Pct. 3
Commissioner Paul Lott, Pct. 4